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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1196

ELIZABETH LEWIS HOSACK, et al.,
Appellants,

vs.

JOSEPH R. SMILEY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants appeal from an order of a three-judge District Court for the District of Colorado dated December 4, 1967, upholding the constitutionality of an oath requirement made of the appellants and denying appellants' demands that appellees be perpetually enjoined from requiring said oath.

MEMORANDUM OPINION AND ORDER BELOW

The opinion of the Court is not reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C., Section 1343 (3); 42 U.S.C., Section 1983 and 28 U.S.C., Section 2201, to declare unconstitutional and enjoin the enforcement of a resolution of the Regents of the University of Colorado requiring the execution of a loyalty oath. The order of the District Court denying the plaintiffs' demands for relief was dated December 4, 1967, and notice of appeal was filed in the District Court for the District of Colorado on January 3, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn,* 272 U.S. 295, 305 (1926); *Florida Lime and Avocado Growers Inc.* v. *Jacobsen,* 362 U.S. 73, 85 (1960); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964).

STATE LAW INVOLVED

Involved herein is a resolution adopted by the Regents of the University of Colorado on February 17, 1967, stating:

> "As a condition of employment of all employees and of all teachers paid in whole or in part from public funds, the following oath shall be required:
>
> > 'I solemnly swear or affirm that I will support the the Constitution of the state of Colorado and of the United States of America and the laws of the state of Colorado and of the United States'."

QUESTIONS PRESENTED

Where the regents of a state university require as a condition of employment by the university the execution of an oath to support the Constitution of the State of Colorado and of the United States of America and the laws of the State of Colorado and of the United States, does said requirement

1. Deprive those required to take the oath of liberty without due process of law by reason of the vagueness of the oath; or

2. Deprive those required to take the oath of procedural due process; or

3. Inhibit and restrain the freedom of speech protected by the First Amendment of those required to execute the oath; or

4. Deny to those required to take the oath the equal protection of the laws in that the execution of said oath is not required of all employees of the University; or

5. Impair the obligation of contracts made between the University of Colorado and its employees prior to the adoption of said resolution in violation of Article I, Section 10 of the Constitution of the United States?

STATEMENT OF THE CASE

On February 17, 1967, the Regents of the University of Colorado adopted a resolution stating as follows:

> "As a condition of employment of all employees and of all teachers paid in whole or in part from public funds, the following oath shall be required:
>
> > 'I solemnly swear or affirm that I will support the Constitution of the state of Colorado and of the United States of America and the laws of the state of Colorado and of the United States'."

Thereafter the appellants, salaried employees and teachers at the University of Colorado were advised by the school administration (Exhibits 1 and 2 attached to the complaint) that failure to execute the oath would result in the termination of their employment even though their employments had commenced prior to the adoption of said resolution by the Regents. The appellants have declined to execute the required oath as they feel it infringes upon their rights guaranteed by the United States Constitution. This class action was subsequently commenced and necessarily involves employees, faculty and staff of the University whose employment commenced prior to the adoption of the oath requirement. The factual representations in the complaint were stipulated to be accurate and, accordingly, the hearing before the District Court consisted solely of oral argument by counsel. As originally promulgated, the oath was not required of faculty who had executed a former oath heretofore declared unconstitutional in *Gallagher* v. *Smiley*, 270 F. Supp. 86. The decision of the District Court concluded that the subject oath is valid providing the Regents require the execution of the oath by old as well as new employees, which requirement the Regents then made uniform by a resolution of December 15, 1967. The question of impairment of contractual obligations was not argued or raised in the District Court, it having become an issue by virtue of the District Court decision of December 4, 1967, and the resolution of the Regents of the University of Colorado of December 15, 1967. All of the appellants were employees of the university prior to the oath requirement adopted on December 15, 1967, and one of the named appellants as well as many others unnamed were on permanent tenure prior to said date. The Regents' resolution now seeks to alter and add the oath requirement as a new condition of the employment contract previously entered into by the parties.

The District Court denied appellants' prayed for relief on December 4, 1967. Notice of appeal was filed on January 3, 1968.

THE QUESTIONS ARE SUBSTANTIAL

1: The oath requirement violates due process by reason of its vagueness. The word "support" can be interpreted to mean many things and raises endless questions as to what might be construed as a lack of support. Black's Law Dictionary submits one definition,

> "To support a rule or order is to argue in answer to the arguments of the party who has shown cause against a rule or order nisi."

Third Edition, page 1682. Under this definition the mere act of lending assistance or sympathy to one side or other of a controversy could be interpreted to be support or lack of support. Thus the appellants now required to sign this oath could later be accused of failure to support the laws of the State of Colorado by engaging in a controversial argument in which they would urge repeal of certain laws of the state. In *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 7 L. Ed. 2d 285, 82 Sup. Ct. 275, in considering the problem of vagueness and the use of the word "support", this Court said,

> "Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid' or 'support' or 'advice' or 'counsel' or 'influence' to the Communist Party. What do these phrases mean? In the not too distant past, Communist Party candidates appeared regularly and legally on the ballot in many states and local elections. Elsewhere, the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could

> a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it? The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive."

The oath this Court is now being asked to consider is even less specific in what it means by the application of support for the Constitution or the law, either federal or state. The very sweep of the oath requirement raises unending questions as to what might be construed as lack of support. Would statements made by a signer of the oath, disagreeing or disapproving of specific laws, constitute a violation of the oath? Would refusal to cooperate with federal or state investigative committees, participation in "civil disobedience", or being arrested and convicted for disturbing the peace, disorderly conduct or even for a traffic charge be considered a violation of the oath to support the laws of the State of Colorado?

It is clear therefore that the requirements of this oath under consideration fall within those decisions of this Court which hold that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Connally* v. *General Con-*

struction Co., 269 U.S. 385, 70 L. Ed. 322, 46 Sup. Ct. 126. As this Court said in *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 243, 76 L. Ed. 1062, 1083, 52 Sup. Ct. 559,

> "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

A careful reading of the required oath itself and the promulgating procedures set out in appellants' Exhibits 1 and 2 attached to the Complaint reveal no ascertainable standard at all.

The oath and promulgating letters are constitutionally inadequate when tested in the light of the basic principle that standards must meet an even more exacting test when they operate to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. In no area is freedom of expression valued more highly than in our academic institutions. This is well expressed in *Keyishian* v. *Board of Regents*, 17 L. Ed. 2d 629, 640,

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers

> and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."

In the *Keyishian* case, the standards were more specific than mere support or non-support of laws and constitutions. There, the prohibited acts were seditious utterances and the advocating and distributing of material which advocates forceful overthrow of government. The specification of these acts was found inadequate by this Court when the matter of encroachment upon First Amendment freedoms was at stake.

2. Due process requires procedures by which the rights of those charged with violating their oath may have an opportunity to be heard. Particularly is this so when a determination that an oath had been violated would subject the oath taker to criminal prosecution. In the requirement before this Court there is no provision whatsoever for rudimentary due process procedures in the removal of a teacher or employee for having violated the requirements of the oath. There is no provision for specifying of charges, for a fair hearing, for the right to confront adverse witnesses and to have witnesses in defense, the right to counsel, and the right to an appeal. It is of interest to note that in *Keyishian* the New York law at least provided for an appeal to the Courts for a review of a dismissal. The requirements posed here by appellees are violative of the core principle of the Fifth Amendment that no person shall be deprived of his life, liberty or property without an opportunity to be heard. It embodies the elements of our basic conception of justice. See, e.g., *Londoner* v. *Denver*, 210 U.S. 373; *Greene* v. *McElroy*, 360 U.S. 474. It is clear that the lack of any procedural standards and safeguards required by the Fifth Amendment makes the oath requirement invalid. A challenge to the

validity of a loyalty oath required of public employees was upheld in the case *Heckler* v. *Shepard*, 243 Fed. Supp. 841, wherein the state employee was provided no hearing prior to discharge for failure to subscribe to the oath, the Court holding that this was a violation of due process, saying at page 847,

> "For it is a fact of common knowledge, of which we take judicial notice, that where dismissal automatically follows failure to take and subscribe a 'test oath', the inevitable assumption of the community is that the employee failed the 'test.' So it is that the Idaho loyalty-oath statute, as now drafted unavoidably presupposes unlawful advocacy on the part of each non-complying individual. Discharge without a hearing under these circumstances presents a clear case where 'government action has operated to bestow a badge of disloyalty, of infamy, with an attendant foreclosure from other employment opportunity.' (*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 898.)."

This Court in *Nostrand* v. *Little*, 362 U.S. 474, 4 L. Ed. 2d 892, 8 Sup. Ct. 840, recognized the importance of hearing prior to discharge for refusal to sign a loyalty oath, by noting that the Court below had not considered the lack of hearing and remanding the case for further consideration on that point. An Arizona oath requirement was struck down in *Elfbrandt* v. *Russell*, 384 U.S. 11, 16 L. Ed. 2d 321, 86 Sup. Ct. 1238, as violative of due process in that it did not contain the element of intent to forward the unlawful purpose of membership in the Communist Party. The Colorado Regents' oath likewise has no requirement that the lack of support of constitutions and laws must necessarily be coupled with an intent to forward an unlawful purpose.

3. The requirement in question unconstitutionally limits and restrains speech protected by the First Amendment of the public employees and teachers at the University of Colorado.

The "old oath" referred to above had been on the statute books of Colorado since its passage in 1921, a period characterized by the anti-communist hysteria following World War I and the passage of red flag and loyalty oath legislation. Enforcement of the oath was uniformly disregarded in the 1930's and 1940's, and revival of its use came only with the rise of McCarthyism after World War II and anti-communist feelings generated by the cold war. Now, as in 1920-21, the mounting public feeling has again brought on the demand by some patriots to press for public showing of loyalty from teachers. When the 1920 oath was struck down in *Gallagher*, the Regents of the University of Colorado felt constrained to preserve some kind of loyalty oath for teachers, and even before the *Gallagher* decision was handed down, proceeded to promulgate their own. As a gesture to the principle of equal protection it was required of all employees of the University, but the circumstances under which the new oath was established show clearly that it was aimed particularly at teachers. Certainly, they are the ones who guide and train our youth and are laboring in an area in which such devices as loyalty oaths as means of securing conformity are most likely to be applied. Teachers and students must always be free from such arbitrary political coercion to conform and remain free to inquire, to study and to evaluate *Keyishian* v. *Board of Regents*, supra. The infringement upon freedom of speech remains, even though the more odious portions of it have been removed as a result of the *Gallagher* decision.

It is now clear that state employees and particularly teachers enjoy the protection of freedom of speech guaranteed by the First Amendment and the notion that public employment may be withheld subject to any conditions which the state may choose to impose has been thoroughly discredited. *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360. The requirement in the oath that the signer must support both federal and state constitutions and laws has the effect of restraining significant areas of free speech. The teacher or university employee is constantly faced with the vague problem of what expression or action on his part might be interpreted as lack of "support" of the constitutions and laws in question. It makes no distinction between expression which could be considered lawful lack of support and unlawful lack of support. Until there is established within the requirement of the oath a distinction between lawful and unlawful, the requirement as it now stands must be deemed an infringement of free speech. *Dennis* v. *United States*, 341 U.S. 494. Nowhere is the full scope of constitutionally protected freedom of speech more appropriate and nowhere more essential than in our colleges and universities. In *Barenblatt* v. *United States*, 360 U.S. 109, 112, this Court stated:

> "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the nation, are claimed, this Court will always be on the alert against intrusion by Congress into the constitutionally protected domain."

4. The oath violates the principle of equal protection of the law. It is significant that the old 1921 statutory oath was required of all teachers in educational institutions, both public and private, throughout the state. The

new oath promulgated by the Board of Regents of the University of Colorado affects only the employees of that institution. There are many other state colleges and universities which are not under the management and control of the Board of Regents and, accordingly, teachers in those institutions are not subject to this new oath requirement. In fact, the number of teachers affected by it form a very small portion of the total number of teachers in both public and private institutions. This has resulted in an undue and unwarranted violation of equal protection of the laws as they relate to the teaching profession in the State of Colorado. This Court in *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1885), in defining the principle of equality before the law said:

> "That no greater burdens should be laid upon one than are laid upon others *in the same calling and condition*, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Emphasis added.)

Even though the Court below and the university administration attempted to avert the equal protection problem by requiring that the oath be signed by all employees, whether teachers or otherwise, the fact remains that discrimination exists between teachers at the University of Colorado as distinguished from teachers in other state and private institutions throughout Colorado. There is no logical nor fair reason for distinguishing between teachers at the University of Colorado and those in other institutions. See *Housing Authority* v. *Cordova*, 130 Cal. App. 2d Supp. 883 (1955), cert. den. 350 U.S. 969, 405 (1956) (cited with approval in *Sherbert* v. *Verner*, 374 U.S. 398, 405 [1963]). The obvious thrust of the oath is against teachers as distinguished from thousands of other public employees. Such random application is not permissible, *McLaughlin* v. *Florida*, 379 U.S. 184, 190 (1964).

5. The oath requirement violates the obligation of contracts existing between the University of Colorado and its employees prior to its adoption. The obligation of a contract is impaired by a resolution having the force and effect of a statute which alters the terms of the contract by imposing new conditions. *Northern P. R. Co.* v. *Minnesota*, 208 U.S. 583, 52 L. Ed. 630, 28 Sup. Ct. 341; *Barnitz* v. *Beverly*, 163 U.S. 118, 41 L. Ed. 93, 16 Sup. Ct. 1042; *Murray* v. *Charleston*, 96 U.S. 432, 24 L. Ed. 760.

CONCLUSION

This Court has jurisdiction of this direct appeal and the questions presented are substantial. For the reasons stated, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 67-C-310

ELIZABETH LEWIS HOSACK, MARTHA DICKINSON, DONALD E. KING, MALLIE TRUMAN HARRIS, THOMAS A. STEWART, PATRICIA JONES, PAUL EDWARD BIAGI, ERNEST M. URVATER and VERTRAM MORRIS,
Plaintiffs,

vs.

JOSEPH R. SMILEY and the REGENTS OF THE UNIVERSITY OF COLORADO,
Defendants.

Mr. William F. Reynard, Attorney at Law, 1700 Broadway, Denver, Colorado and Mr. John D. Herron, Attorney at Law, American Civil Liberties Union, 507 American National Bank Building, Denver, Colorado, for the Plaintiffs; Mr. John P. Holloway, Resident Counsel for the University of Colorado and Assistant Attorney General, P. O. Box 13, Boulder, Colorado, for the Defendants.

Before LEWIS, Circuit Judge, and LANGLEY and DOYLE, District Judges.

Memorandum Opinion and Order

DOYLE, District Judge.

The Plaintiffs herein, teachers and employees of the University of Colorado, seek injunctive relief against the enforcement of a University requirement that they take an oath to support the Constitution and laws of the United

States and the Constitution and laws of the State of Colorado as a condition of their employment. The allegations are that the Plaintiffs are deprived of rights, privileges, and immunities of citizens of the United States secured by the Fourteenth Amendment, Constitution of the United States.

Jurisdiction exists by reason of 28 U. S. C. 1343(3), and 42 U. S. C. 1983. In addition to injunctive relief, Plaintiffs also demand a declaration of rights in accordance with 28 U. S. C. 2201.

The Complaint alleges: (1) That the oath is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment; (2) That the oath infringes First Amendment freedom of expression contrary to the Fourteenth Amendment; (3) That the oath requirement is deficient in failing to provide hearing procedures for persons who refuse to take the oath; (4) That discrimination exists in the administration of the oath in that persons who took the old oath, which was declared invalid by this Court, are not required to take the new oath—the basis being that only parts of the old oath were condemned, and the part which is now embodied in the new oath remained.

The classes before the Court consist of both teachers and employees. Some had taken the old oath. Others had not taken the old oath and are refusing to take the new one.

The matter was heard by a three judge court convened pursuant to 28 U. S. C. 2281. Briefs have been filed and the case stands submitted.

The old oath which was prescribed by the Colorado General Assembly, C. R. S. 1963 123-1[illegible] was struck down in our recent decision in *Gallagher* v. *Smiley*, 270 F. Supp. 86. In that case, speaking through Judge Chilson, we said:

> "The Court concludes as a matter of law that the statute requiring the plaintiff to take the oath in question, when construed in the light of *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), is violative of due process because the oath is unduly vague, uncertain and broad and that a permanent injunction should issue prohibiting the defendants from requiring the plaintiff to take it."

The oath there in question was more extensive than that now before us although it contained the present oath as well. The regents promulgated the present oath in an effort to comply with the *Gallagher* decision. This oath simply provides:

> "I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of the State of Colorado and of the United States."

The Regents did not, however, require that all personnel take the new oath. Those who had taken the old oath were not required to take the new one. The reason for this would appear to be that the Regents considered the non-condemned part of the old oath as still standing.

I

Contrary to the contention of the plaintiffs we hold that the oath in question is not vague and indefinite so as to be in violation of the Fourteenth Amendment. First of all, the act of the Regents in promulgating the oath is legislative. The Supreme Court has enunciated a test for determining whether a statute is unconstitutionally vague. *Conally* v. *General Construction Co.*, 269 U. S. 385, at 391 and see also *Cramp* v. *Board of Instruction of Orange County*, 368 U. S. 278, 287:

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of

> common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The oath in question is plain, straight-forward and unequivocal. A person taking it is not left in doubt as to his undertaking. The obligation assumed is one of simple recognition that ours is a government of laws and not of men. Such an oath was upheld in *Knight* v. *Regents of the University of the State of New York*, 269 F. Supp. 339, 341 (S. D. N. Y. 1967), wherein it was said:

> "The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign."

We have considered the very recent decision of the Supreme Court in *Whitehill* v. *Elkins*, 88 Sup.Ct.Rep. (Adv. Sheet) 184. That case does not condemn loyalty oaths in general and does not bear on the issues in this case.

II

Nor does the oath have any tendency to curtail freedom of expression as guaranteed by the First Amendment (and incorporated in the Fourteenth). Recognition of and respect for law in no way prevents the right to dissent and question repugnant laws. Nor does it limit the right to seek through lawful means the repeal or amendment of state or federal laws with which the oath taker is in disagreement. Support for the constitutions and laws of the nation and state does not call for blind subservience. Such an extreme concept is not now nor has it ever been accepted.[1]

1. In *Konigsberg* v. *State Bar of California*, the Supreme Court held that Bar Examiners were not justified in refusing admittance to an applicant who had severely criticized officials and laws. The Court said in a dictum that "Because of the very

The law applicable to legislators provides what seems to us to be a clear analogy. The Constitution Art. VI, Section 3 requires that they as well as executive and judicial officers must take an oath "to support this constitution." The Supreme Court in dictum at least has said that a legislator can be required to take an oath to support the Constitution of the United States. *Bond* v. *Floyd*, 385 U. S. 116, 87 S. Ct. 339, 349. In this case the Supreme Court has indicated that on public issues at least, the freedom of expression of a legislator who is bound by the constitutional support oath is as broad as that of a private citizen who is not restricted by the constitutional oath.[2]

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nature of our democracy such expressions of political views must be permitted. Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism.[29] Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character' than if it should be attempted directly." 353 U. S. 252, 269 (1957).

2. "The State declines to argue that Bond's statements would violate any law if made by a private citizen, but it does argue that even though such a citizen might be protected by his First Amendment rights, the State may nonetheless apply a stricter standard to its legislators. We do not agree." *Bond* v. *Floyd*, *supra*, at 348.

"The State attempts to circumvent the protection the First Amendment would afford to these statements if made by a private citizen by arguing that a State is constitutionally justified in exacting a higher standard of *loyalty* from its legislators than from its citizens. Of course, a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens. But this difference in treatment does not support the exclusion of Bond, for while the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.[13] The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, as summarized in the opinion of the Court in *New York Times* v. *Sullivan*, 376 U. S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d (1964), is that 'debate on public issues should be uninhibited, robust, and wide-open.' We think the rationale of the *New York Times* case

It is recognized, of course, that the courts are scrupulous in protecting the right of freedom of expression in the academic institution.[3] But this right is no less important in legislative bodies where public debate "* * * uninhibited, robust and wide-open * * *" *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964), is an indispensable ingredient of our law making process.

So we hold that an oath to support the constitution and laws of the state and nation does not and can not run counter to First Amendment freedoms.

III

In support of their contention that the "old oath" was held invalid in part only and that the remainder retains vitality, Defendants argue that since this Court in *Gallagher, supra*, relied entirely on the decision of the Supreme Court in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), wherein the Supreme Court was concerned primarily with the expansive portions of the oath there in question, it was only the expansive parts which were condemned.

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disposes of the claim that Bond's statements fell outside the range of constitutional protection. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that the *New York Times* principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. We find no support for this distinction in the *New York Times* case or in any other decision of this Court. The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Bond* v. *Floyd, supra*, at 349.

3. *Keyishian* v. *Board of Regents of the University of New York*, 385 U. S. 589, 87 S. Ct. 675 (1967).

It is further argued that persons who subscribed to the old oath need not again swear to support the Constitutions and laws of the United States and of the State of Colorado. This position assumes that an oath like a statute is severable whereby the valid portion of it can be salvaged. We seriously question whether the severability doctrine can be applied in this manner. In any event the argument is in other respects invalid. The Supreme Court in *Baggett* voided the statutes which provided the underpinnings for the oath and in doing so the Court voided the oath in its entirety. Similarly this Court in *Gallagher* held the Colorado statute which prescribed that oath to be unconstitutional. The result is that the legislative oath became a nullity. Now we have a completely new oath which has been legislated by the Board of Regents. To hold that the old legislative oath retains some vitality so that those who took it are to be excused from taking the new one would be anomalous.

Moreover, great confusion would result from accepting the argument of Defendants. The oath has a personal quality. It is administered by confronting the oath-taker with the precise provisions of his undertaking. To now hold that he is bound by so much of that which he has taken as has not been held invalid would certainly create uncertainty and would threaten the vice of vagueness which we frequently encounter in the oath area. This problem is expressed by the Supreme Court in *Baggett* as follows:

> "The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to 'steer far wider of the unlawful zone' * * * than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk

of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett* v. *Bullitt, supra,* at 372. See also *Keyishian* v. *Regents of the University of New York, supra,* at 684.

In view of the mentioned considerations, we must hold that the new oath which we have upheld be applied equally to all. To apply it to new employees alone constitutes an invalid and discriminatory classification and thereby violates the equal protection clause of the Fourteenth Amendment.

IV

Plaintiffs' final contention is that the failure on the part of the Regents to create hearing procedures in conjunction with the oath violates procedural due process as guaranteed by the Fourteenth Amendment.

We note at the outset that procedural due process does not demand a formal hearing in every instance and certainly not in connection with every dismissal from public employment. *Cafeteria and Restaurant Workers Union, etc.* v. *McElroy,* 367 U. S. 886 (1961). Where the dismissal may affect the person's reputation the courts are more apt to require a hearing as a safeguard against arbitrary dismissal. See *Birnbaum* v. *Trussell,* 371 F.2d 672, 678 (2nd Cir. 1966). Similarly where dismissal may reflect upon one's loyalty the courts require a hearing. *Wieman* v. *Updegraff,* 344 U. S. 183 (1952); *Slochower* v. *Board of Higher Education,* 350 U. S. 551 (1956).[4]

4. However, it is interesting to note that in *Cafeteria Workers* v. *McElroy, supra,* where a 5-4 majority held that dismissal without a hearing did not violate due process, dismissal for "security reasons" was not a case ". . . where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." *Supra* at 898.

Ordinarily a hearing serves to bring the person threatened with dismissal face to face with his accusers whereby he can cross-examine them. It also gives him an opportunity to present his side of the case and permits a test of the merits. However, these salutary objects are not present in the case of the failure to take or subscribe to an oath. The action itself is final and conclusive. No amount of hearing can change the fact that the person has refused to take it. Thus, the purpose usually served by the hearing is not served in this kind of a case. True the accused can make a record and expound his reasons, but this is for public consumption rather than for the authorities. This latter objective could be accomplished by issuing a statement to the press. Compare *Heckler* v. *Shepard*, 243 F. Supp. 841, 847 (E. D. Idaho 1965).[5] Therefore, in the case at bar where the oath is as we have said simple, direct and unambiguous, the hearing as to why the accused refused to take it would be virtually meaningless. The examiners would be called upon to merely hear the defendant's reasons for refusal, but it could not change the result either at the administrative or court level. For

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5. *Heckler* v. *Shepard* is distinguishable on its facts, since the oath there in question involved, in addition to a positive support provision, an extensive series of negative disclaimer provisions, relating to past activities as well as future conduct. The court's attention seems to be directed primarily to the disclaimer provisions rather than the positive support provision:

> "It should be noted at the outset that the complete statutory oath has several distinct aspects. First among these is the requirement to swear (or affirm) allegiance to the United States of America and to the State of Idaho. We do not understand that this allegiance aspect of the oath is challenged here by others than the plaintiffs who are aliens." *Supra* at 844.

The implication which may arise in the public mind from one's failure to subscribe to specific disclaimers of subversive activity may be far different than the public attitude toward one who refuses to take a simple support oath. Refusal in the first instance may give rise to suspicions of disloyalty. In the latter situation, refusal to subscribe to the oath will more likely cause one to be suspected of eccentricity than subversion.

these reasons we disagree with the Plaintiffs' contention that there is a procedural due process deprivation growing out of the failure to provide a hearing.

* * *

Having concluded that the oath in question is valid and having determined that the sole deficiency is that noted under point III of this opinion, namely the deficiency inherent in requiring new employees to take the oath and excusing the old employees from doing so, the Defendants are granted thirty days within which to decide whether to require uniform compliance by old as well as new employees. If the Defendants fail to make this administrative change the Court will, at the end of the mentioned period of time, grant the relief which is here sought. Jurisdiction of the case is retained for this limited purpose. In all other respects the Plaintiffs' demands for relief are denied.

DATED at Denver, Colorado, this 4th day of December, A. D. 1967.

By the Court:

/s/ David T. Lewis
David T. Lewis, Judge
United States Court of Appeals

/s/ Edwin Langley
Edwin Langley, Chief Judge
United States District Court
Muskogee, Oklahoma

/s/ William E. Doyle
William E. Doyle, Judge
United States District Court
District of Colorado

PREME COURT, U. S.

APR 1 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1196

ELIZABETH LEWIS HOSACK, et al.,
Appellants,

vs.

JOSEPH R. SMILEY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM OR DISMISS

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MOTION TO AFFIRM OR DISMISS

Appellees in the above-entitled action move to dismiss or affirm on the grounds that the appeal does not present questions so substantial as to require further argument and that appellants have no standing to raise certain of the issues they present on appeal.

ARGUMENT

1. The issues of substantive due process and freedom of speech presented in questions 1 and 3, respectively, are not so substantial as to require further argument.

Identical issues were raised and disposed of in a manner directly contrary to appellants' position here in *Knight* v. *Board of Regents*, 269 F.Supp. 339 (1967), Aff'd (per curiam) 88 S.Ct. 816, 19 L.Ed.2d 812 (1968).

In addition the Court has voiced approval of simple oaths of minimal loyalty to the government on several other occasions. *American Communication Ass'n* v. *Douds*, 339 U.S. 382, 415 (1950); *Bond* v. *Floyd*, 385 U.S. 116, 132 (1966).

2. Appellants have no standing to raise the issue of procedural due process as presented in question 2.

The record below shows, on its face, that none of the appellants have, in fact, been discharged from employment by the University of Colorado for refusal to take the loyalty oath or for noncompliance with its terms. Neither have any of the appellants requested a hearing or been denied a hearing.

The question of a hearing remains hypothetical and contingent. It has long been the Court's practice "not to decide abstract, hypothetical or contingent questions." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945). *See also, Giles* v. *Harris*, 189 U.S. 475, 486 (1903); *Texas* v. *Interstate Commerce Comm'n*, 258 U.S. 158 (1922); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 324 (1936); *New York* v. *Illinois*, 274 U.S. 488 (1927); *Arizona* v. *California*, 283 U.S. 423 (1931).

3. The factual basis of question 4 is inadequate to support further argument.

Appellants contend that if they were required to take the oath in question, they would be denied equal protection of the laws, as guaranteed by the Fourteenth Amendment, by virtue of the fact that employees of other Colorado institutions are not required to take similar oaths.

As appears in the record below, the University of Colorado is governed by the Board of Regents of the University of Colorado, a body which is constitutionally vested with very broad powers. COLO. CONST., Art. IX, §§ 12-14, which provides as follows:

> *Section 12. Regents of university.*—There shall be elected by the qualified electors of the state, at the first general election under this constitution, six regents of the university, who shall immediately after their election be so classified by lot, that two shall hold their office for the term of two years, two for four years and two for six years; and every two years after the first election there shall be elected two regents of the university, whose term of office shall be six years. The regents thus elected and their successors, shall constitute a body corporate to be known by the name and style of "The Regents of the University of Colorado."
>
> *Section 13. President of university.*—The regents of the university shall, at their first meeting, or as soon thereafter as practicable, elect a president of the university, who shall hold his office until removed by the board of regents for cause; he shall be ex officio, a member of the board, with the privilege of speaking, but not voting, except in cases of a tie; he shall preside at the meetings of the board, and be the principal executive officer of the university, and a member of the faculty thereof.

> *Section 14. Control of university.*—The board of regents shall have the general supervision of the university, and the exclusive control and direction of all funds of, and appropriations to, the university.

These powers have been more specifically defined in the following cases: *In re Mackey's Estate,* 46 Colo. 79, 102 P. 1075 (1909); *People ex rel. Jerome* v. *Board of Regents,* 24 Colo. 175, 49 P. 286 (1897); *Burnside* v. *Board of Regents,* 100 Colo. 33, 64 P.2d 1271 (1937); *Sigma Chi Fraternity* v. *Board of Regents,* 288 F.Supp. 515 (D.C. Colo. 1966); *Buttny, et al.* v. *Smiley, et al.,* Civil No. C-666 (D.C. Colo., Feb. 14, 1968).

If the Board of Regents, as an employer, were required to treat all its employees exactly as employees of all other state agencies are treated, its constitutionally vested powers would become meaningless. The Colorado Constitution created a potential "class" of employees of the University of Colorado in creating the University and its governing body. The Regents have simply directed that that class be administered an oath.

It is clearly settled that any classification adopted by a state, in the exercise of its legitimate ends, which classification has a reasonable basis and is not arbitrary will be sustained against an attack based upon the equal protection clause of the Fourteenth Amendment. *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U.S. 129, 137 (1921); *Watson* v. *Maryland,* 218 U.S. 173 (1910); *Bachtel* v. *Wilson,* 204 U.S. 36, 41 (1907); *Smith* v. *Cahoon,* 283 U.S. 553, 566-67 (1937); *Landwehr* v. *Regents of University of Colorado,* 156 Colo. 1, 396 P.2d 451 (1964).

Since the classification involved herein was not made by the Regents but by the Colorado Constitution, appel-

lants' attack on the basis of the Fourteenth Amendment guarantee of equal protection amounts to a collateral attack on the Constitution of the State of Colorado. This attack cannot be sustained unless the Court is of the opinion that it is an arbitrary and unreasonable classification for a state constitution to create a special governing body for the state university.

4. The factual basis of question 5 is inadequate to support further argument.

The record below indicates that all the appellants were hired by the University of Colorado prior to the date the Regents adopted the presently contested oath on February 17, 1967. Inasmuch as the prior oath was not invalidated until April 24, 1967, *Gallagher* v. *Smiley*, 270 F.Supp. 86 (D.C. Colo. 1967), appellants were all hired while that oath was in effect and either subscribed to it or had knowledge that it was a condition of employment. Since the new oath is a verbatim duplication of the first sentence of the old oath, the former requires nothing of appellants which was not required as a condition of their original employment. Therefore, there can logically be no impairment of their contractual rights.

CONCLUSION

In the five questions presented in appellants' Jurisdictional Statement there are no issues raised which require further argument in view of prior decisions of the Court,

lack of standing and insufficient factual basis. Therefore, appellees' Motion to Affirm or Dismiss should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

HOSACK ET AL. *v.* SMILEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 1196. Decided April 29, 1968.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.